



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
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SUBJECT: If the Bay Delta Accord Expires....Again
TO: Club FED
FROM: Tom Hagler, EPA

This memorandum describes what "happens" if the Bay Delta Accord expires at the end of this year. This memorandum is based on one dated 02/14/97 prepared jointly by EPA, BOR, FWS, and NMFS in anticipation of the initial expiration of the Accord on December 15, 1997.

Note that the Bay Delta Accord was "extended" in December 1997. Three points are important about this previous "extension":

- (1) Only the State and Federal signatories extended the Accord. This means that any obligations in the Accord of the other Accord signatories were not formally extended.
- (2) The Accord was extended until December 31, 1998.
- (3) The extension did not attempt to answer any of the many interpretation issues that have arisen about the Accord. This means that differences of opinion between the state and federal governments about, for example, "no net loss," have not been resolved.

The Bay Delta Accord included both "continuing commitments" (an ongoing commitment to perform a certain task or maintain a certain policy) and "single-action commitments" (tasks that need to be accomplished only once).

Expiration of "Continuing Commitments"

The following continuing commitments expire with the Accord on December 31, 1998, with varying impacts that are described:

- (1) The Federal government's "hold harmless" agreement (that any additional water supply needs caused by additional ESA listings will be provided by willing-seller purchases by the Federal government) expires this December. Accord, p. 5.

(2) The Federal government's commitment to "credit" any CVP water used to attain the new water quality standards against the CVPIA §3406(b)(2) water expires this December. Accord, p. 6. However, Interior has apparently committed to continuing this crediting provision indefinitely. See Garamendi Forum papers.

(3) The Federal government's commitment that it will not impose additional water costs through biological opinions (other than those that can be met through "no net loss" in the Ops Group) expires this December. Accord, p. 3.

(4) The Bureau's obligation under the Accord to provide San Joaquin River flows at Vernalis, pending State Board action to assign that burden, expires this December. Nevertheless, the Bureau may still be obligated to provide these flows under the ESA delta smelt OCAP biological opinion, because these flows were included in the project description and failing to provide these flows would trigger a reinitiation of Section consultations on the opinion.¹ Accord, Attachment B.

Single-action Commitments That Have Been Accomplished

(1) The State Board adopted, and EPA approved, the 1995 Water Quality Control Plan reflecting the water quality provisions in the Accord. The objectives (standards) in this Plan remain in effect until and unless they are revised as part of the State Board's next "triennial" review. Accord, p. 6.

(2) The State Board adopted Decision 95-6, which substantially implemented the 1995 WQCP during the interim period. Accord, p. 6. In effect, Decision 95-6 imposes the burden of meeting many of the provisions of the 1995 WQCP on the State and Federal projects. This Decision expires in December 1998. Unless a subsequent implementation order is adopted before Decision 95-6 expires, the state implementation plan reverts to the old Decision 1485 order. If that occurs, the projects would, in essence, be governed by the existing ESA biological opinions, which are generally stricter than D-1485.

¹This is one of the more complicated issues we face. The State Board, in Water Rights Decision/Order 95-6, ordered the implementation of most of the water quality provisions in the Accord, and these provisions must be met under the Order until it expires in December 1998 (unless superceded earlier by a subsequent opinion). However, the State Board did not include the Vernalis flow objectives from Attachment B, Section one of the Accord in its Water Rights Decision/Order. For that reason, the Vernalis flows are being implemented through the OCAP biological opinion, which does not expire until the projects fail to comply with its terms.

(3) The Services finalized revised biological opinions on the State and Federal water project operations, consistent with the Accord. Accord, p. 6.

The March 6, 1995 OCAP Biological Opinion discussed the "phased improvement to habitat requirements for the delta smelt and Sacramento Splittail." The three major initiatives that were described in the Biological Opinion included (1) implementation of the State Board's 1995 WQCP standards, (2) Federal agencies carrying out their ESA §7(a)(1) responsibilities, and (3) expected fish protection measures resulting from reopened or expired FERC licenses and expired CVP water contracts occurring in the near future. Therefore, the OCAP Biological Opinion implied that if progress was being made to phase in these actions the Biological Opinion would not expire at the end of three years. However, at some point in the future (3-6 years), if additional progress on these initiatives was not forthcoming, reinitiation would be required.

The November 2, 1994 Biological Opinion on EPA's Water Quality Standards also discussed phasing. This Biological Opinion discussed short-term actions as those "that will be available for implementation in the next three years" and long-term actions which "will not be available until after 1998." No incidental take was authorized for this Biological Opinion. Reinitiation of consultations would be required if "...the State Board adopts an implementation plan, proposes new or revised standards pursuant to the triennial review or...on any other occasion the standards are revised."

Single-action Commitments That Have Not Been Accomplished

(1) The State Board has not yet assigned responsibility for the San Joaquin Vernalis flows, which was to occur within three years after the Accord was signed. Accord, Attachment B, Par. 1. This issue is before the State Board in its current water rights

(2) EPA has not yet finalized its withdrawal of Federal water quality standards under the Clean Water Act, although it has initiated this withdrawal process. Accord, p. 5, Par. 1.

(3) The parties have not yet funded the \$180 million addressing "Category III" non-flow factors. To date, the water user community has contributed or committed about \$32 million [IS THIS ACCURATE?], Proposition 204 has approved \$60 million, and the 1997 Federal budget included \$85 million, of which some can be credited against any Federal Category III obligation. The parties have substantially completed a review of the expected benefits of screening programs for listed species. Accord, Attachment C.